1986

State of Utah v. Adolpho Diaz Mendoza and Alberto Ruiz Mendieta : Brief of Respondent

Utah Supreme Court

David L. Wilkinson; Attorney General; David B. Thompson; Assistant Attorney General; Peter L. Rognlie; Deputy Washington County Attorney; Attorneys for Appellant.
J. MacArthur Wright; Wright & Miles; Attorney for Defendant; John E. Meyers; Attorney for Defendent.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, : 20922

Plaintiff-Appellant, :

-v- : Case No. 20922

ADOLPHO DIAZ MENDOZA and :
ALBERTO RUIZ MENDIETA,

:

Defendants-Respondents.

:

BRIEF OF DEFENDANT-RESPONDENT (MENDIETA)

DEFENDANT-RESPONDENT MENDIETA RESPONDS TO BRIEF OF APPELLANT RE: INTERLOCUTORY APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE, IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

JOHN E. MEYERS, ESQ.,
The Bradbury Building
304 So. Broadway, Suite 432
Los Angeles, California 90013

Telephone: (213) 680-2404

Attorney for Defendant-Respondent
ALBERTO RUIZ MENDIETA

DAVID L. WILKINSON (3472)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City Utah 84114
PETER L. ROGNLIE (4131)
Deputy Washington County Attorney
P. O. Box 579
St. George, Utah 84770

Attorneys for Appellant

J. MacARTHUR WRIGHT
WRIGHT & MILES
P. O. Box 339
St. George, Utah 84770

Attorney for Defendant Mendoza

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 20922
ADOLPHO DIAZ MENDOZA and ALBERTO RUIZ MENDIETA,	:	
Defendants-Respondents.	:	

BRIEF OF DEFENDANT-RESPONDENT (MENDIETA)

DEFENDANT-RESPONDENT MENDIETA RESPONDS TO BRIEF OF APPELLANT RE: INTERLOCUTORY APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE, IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

JOHN E. MEYERS, ESQ.,
The Bradbury Building
304 So. Broadway, Suite 432
Los Angeles, California 90013

Telephone: (213) 680-2404

Attorney for Defendant-Respondent
ALBERTO RUIZ MENDIETA

DAVID L. WILKINSON (3472)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City Utah 84114
PETER L. ROGNLIE (4131)
Deputy Washington County Attorney
P. O. Box 579
St. George, Utah 84770

Attorneys for Appellant

J. MacARTHUR WRIGHT
WRIGHT & MILES
P. O. Box 339
St. George, Utah 84770

Attorney for Defendant Mendoza

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

RULES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 20922
ALDOLPHO DIAZ MENDOZA and ALBERTO RUIZ MENDIETA,	:	
Defendants-Respondents.	:	

STATEMENT OF ISSUES PRESENTED ON APPEAL

Defendant-Respondent Mendieta views the following issues as being presented by the Interlocutory Appeal:

1. The trial court's failure to make findings under Utah R. Crim. P. 12(g):

   a. Whether the trial court implicitly made such findings based on the outrageous conduct of the Border Patrol, and,

   b. Whether Rule 12(g) Utah R. Crim. P. is unconstitutional as embracing a lower standard of search and seizure in violation of the United States Constitution Fourth Amendment.

2. Whether the standard applied by the trial judge in suppressing the evidence based on the illegal stop and search of the vehicle was a substantial violation of defendant's rights and, whether committed in good faith or bad faith by the arresting officers.

3. Whether the defendants had "standing" to challenge the stop/search of the vehicle?

4. Whether statements elicited from both the driver and passenger of the vehicle by members of the Border Patrol were in

violation of the defendant's Fifth Amendment rights under Miranda v. Arizona, the defendants having been "detained" and "seized" within the Fourth Amendment in that they were not free to leave the scene at the time the statements were made and were in "custody" at the time the statements were made.

5. Whether the stop of the vehicle and the detention of the defendants was illegal and whether the subsequent interrogation followed by the arrest of defendants and the search of the vehicle producing the contraband were properly suppressed by the trial court.

6. Whether the mere fact of the trial judge's failure to specify verbally that the officers acted in bad faith is fatal to his findings, in view of the fact that he found the stop of the vehicle and the statements elicited from the defendants, and the search of the vehicle illegal and a violation of the United States Constitution Fourth Amendment, and, if so whether a simple remand back to the trial court to make the required findings would suffice rather than a reversal.

7. Whether such findings are required at all if this court finds that Rule 12(g) is unconstitutional and in violation of the Fourth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Defendant/Respondent Mendieta agrees with the Attorney General's statement of the case as outlined in his opening brief.

STATEMENT OF FACTS

Defendant/Respondent Mendieta agrees with the statement of the facts as outlined by the Attorney General in his opening brief with the following additions and corrections.

James Stiegler testified at the suppression hearing that he was a United States Border Patrol Agent and had been so for ten years, that his duties on March 16, 1985, in Washington County, Utah, was to conduct a traffic check operation on I-15, explaining that a "traffic check operation" was the observing of traffic as it passed his vantage point on I-15. (See SH 47-49)

Stiegler testified that the point he was parked at had been selected because it was a major route for illegal alien traffic north from the border, the border being the international border with Mexico, and that the border patrol conducts such operations on a yearly basis in Utah, that he had previously worked on two separate occasions in Nephi, Utah in the apprehension of illegal aliens. (See SH 49-50)

Stiegler testified that the I-15 in Washington County was selected as a vantage point because it is the time of year of peak alien activity because of the planting season up north and that there was a lot of traffic from the United States Border north, that about 4:30 A.M., he was operating a "roving check point" observing traffic as it went northward on I-15, that he noticed something unusual at that time, that there were three vehicles approaching, and as they went by he was watching two of them and Officer Fox told him that he thought the black mustang which had passed deserved a second look, that it seemed like the occupants were of latin decent. (See SH 50-52)

The officer along with his partner then followed the mustang with Officer Fox driving, that they accelerated rapidly in order to catch up with the car, that they observed it remained in the passing lane and the occupants did not seem to notice them as they approached, and pulled in behind them. When the occupants did observe them the

they pulled over rapidly and slowed down rapidly at which time the officer noticed the plates on the mustang were California plates. (SH 51-53) The officer described the change from the passing lane to the regular driving lane on the part of the mustang as erratic in that most of the vehicles that he passed were very aware of his presence and did not respond in what Officer Stiegler considered a "normal manner" (emphasis ours) (SH 52-54). The officer further described the movements of the mustang as being jerky and that the mustang remained longer than was necessary in the passing lane and decelerated rapidly. (SH 54 Line 11 - 18)

Stiegler further testified that he felt that a car with California or Arizona plates is an indicator that the vehicle is coming from an area which may be adjacent to the border, that if the plate had been from Colorado or Indiana or New Jersey or one of the other 48 plates it wouldn't have been as significant as a state that was located on the southern border. (SH 55, line 2-14) Stiegler noticed that neither of the occupants of the mustang looked at him, and that both occupants were of latin decent, that he made no special note of the clothing worn at that time, and that although the occupants of the mustang did not look at him he wanted to get a better look into the vehicle and make sure that the occupants saw he and his partner and determine what their reaction to the officers was, so he told Fox to pull along side of them a second time and go all the way up near their front bumper so that he could turn around and cross their line of vision and he then stared at both of their faces. (SH 57, line 2:58-2) Based on his training and experience that the observation of the rigid posture and demeanor of the occupants of the mustang was another indicator to him that they were probably illegal aliens or transporting illegal aliens. (SH 59, line 6 - 20)

He felt the response by the occupants of the mustang was not typical behavior for the average car which he pulls alongside of. Stiegler then testified that the reason he stopped the vehicle was to determine whether the occupants were illegal aliens. (SH 61, line 18-22)

Stielger then testified that after the car was stopped he got out of his patrol car and approached the driver and interrogated him as to his alienage or citizenship. (SH 53, line 4 - 7) The officer also determined at this time that the driver was wearing a Mexican poncho and that would be unusual for United States citizens. (SH 63-64) The driver then admitted to the officer that he was indeed an illegal alien and the officer arrested the driver. (SH 64-65)

On cross-examination Stiegler admitted that he carries out his duties pursuant to Statute 237,(Title 8 of the Immigration Act) and that that act gives immigration officers the power to interrogate any alien or person believed to be an alien anywhere in the United States. (SH 67, line 24:68-20)

Stiegler went on to testify that he did not stop any persons in vehicles who appeared to be caucasion, nor blacks, and in fact that most of the people going north at that time of the year were Mexicans or Mexican-Americans.

Stiegler also testified that he pulled up at a rapid speed behind the mustang, continued at a rapid speed until just behind the vehicle and then applied the brakes or slowed his vehicle very quickly, that the purpose behind that maneuver was to catch up to the car before it got to a group of lights so they could see the interior of the vehicle and the occupants, and viewed it as significant that the car did not immediately pull over which in the officers view would be a "normal" thing to do, admitting though that there were no

lights blinked by the officers nor were there any red lights put on to pull the car over, that their car is a green car, not a black and white car and has a decal on the side. (See SH 76 - 78) Admitting that the police vehicle would look like any other vehicle to the occupants of the mustang, that this maneuver of speeding up at a high rate of speed and braking suddenly behind the mustang was performed on a second occasion at which time the mustang did pull over to the right at which time the officers followed the mustang to the side of the road. (SH 79 - 80) That the officers were three to six feet behind the vehicle at a speed of approximately 55 miles an hour, and that what the officers characterized as "erratic" driving was the fact that the vehicle stayed in the passing lane when there was light traffic and that when the officers approach rapidly and follow closely behind they still stayed in the passing lane and that when they finally moved over their movements were jerky and decelerated rapidly. Admitting again that the border patrol car had no special lights on, no siren, that none were blinked or waved at the car they were following at the time it pulled over. (See SH 79 - 83)

The officer stated in regard to the California plates on the mustang, that California was a border state with Mexico, although he didn't know how much of California bordered on Mexico and had no way of telling whether the car was from Northern California, Los Angeles, or any other location in California. (SH 85 - 86)

The officer further stated that cars with California and Texas plates would cause him to pay more attention to those vehicles especially if there were Mexicans inside. (SH 87, line 3 - 10) That when his vehicle pulled along side the mustang he took as significant the fact that the occupants did not look back at him as most

"Americans" would do. (SH 87, line 23 - 88:6) Finally, that the decision to stop the vehicle was to ascertain if the occupants were illegal aliens or transporters of illegal aliens, and the facts supporting that stop was the fact that it had a California plate, and the way it pulled over after the officers came up behind it quickly and the fact that the car contained two persons of latin decent that did not look back at the officers. (SH 91, line 5 -92:6)

When Stiegler approached the driver's side of the vehicle he asked questions of the driver (Mendoza) as to whether or not he was a United States citizen, did not ask him for any driver's license or identification prior to those questions, was told by Mendoza that he was in the United States legally, and that he had papers but had left them at home and only then did the officer ask for identification which Mendoza was unable to produce, the officer then questioned him further as to whether he was an illegal alien and did not advise Mendoza of his "Miranda" rights before he asked those questions. During this interrogation Mendoza admitted he was an illegal alien and was arrested. The trunk of the vehicle was searched and no consent was obtained to search the vehicle. (SH 92 - 94) Stiegler further admitted on redirect examination that insofar as a "profile vehicle" that this particular ford mustang was not, and that the fact that the vehicle was not a profile vehicle would not be a factor in his consideration in pulling it over. (SH 97 -98)

Dennis Fox testified as follows:

That he was a Border Patrol Agent stationed in Montana on temporary duty in the St. George area of Utah, that on the night in question he was with Officer Stiegler, saw the mustang drive by the point at which the officers were sitting, followed it,

eventually stopped it and does not recall whether he approached the driver or the passenger. (SH 102 -103)

He interrogated the passenger (Mendieta) to see if any immigration law had been broken, he asked for documents and status etc., from Mendieta, Mendieta replied that he had papers but he had left them at home. (SH 104)

With regard to the stopping of the vehicle, Fox testified that he was the driver of the Border Patrol vehicle, that after the vehicle had passed that he wanted a better look at it, and when asked whether the real reason he wanted to stop the car was because the occupants appeared to be Mexican his answer was, he didn't know, he just wanted a better look at the car. (SH 107-108)

In attempting to get this "better look" at the car and the occupants Fox testified that he drove up very fast behind the car then along side of it at speeds up to 85 miles per hour, that when he got up behind them he slowed quickly at which time he was within a few feet of the mustang, that he performed this operation twice, that on the second occasion the car did pull over to the right, that the mustang was not supposed to drive in the passing lane, in his opinion, because where Fox comes from people don't drive in the passing lane. (See SH 109 -112)

Fox further stated that he was not enforcing any Utah traffic laws and that in his experience when he drives up fast behind a vehicle that some people pull over put on the brakes and jump out, both citizens and illegal aliens. (SH 113-114)

When he got a better look at the occupants of the vehicle he observed they were of latin decent and the "way they looked" was significant to him, (SH 115) that they were nervous,

staring straight ahead, and he "wondered" how many people were in the vehicle inasmuch as he could only see two, (SH 115-116) and that he wanted to find out if any others were in the car. (SH 117)

In response to the question as to why he stopped the car, his response was that it was a number of things, a combination of the route of travel, the time of travel, the time of year, California plates on the vehicle and the nervousness of the occupants, (SH 118) and that he didn't know if he would have taken the same action if there was a caucasion driving the car rather than a latin. (SH 118)

Regarding the questioning of the driver, Fox stated that he did not advise him regarding his Miranda rights before he questioned him, "thinks" that he told the driver why he was stopped, but doesn't know for sure, asked him his name, where he was from and if he had immigration documents, that the driver did not have immigration documents. Fox then questioned the passenger (Mendieta), asked him if he was a legal or illegal alien, and was told by Mendieta that he had left his immigration documents at home, that he was here legally, that he checked no further to see where Mendieta's home might be or where he could get the papers, assumed there was a violation of federal law by the fact that Mendieta had said he had no papers on him and further stated that he (Fox) did not have a reasonable suspicion in his mind that Mendieta had violated the law when he asked the question responding that "no, you don't know unless you ask". (See SH 125 - 127)

Fox also testified that he did not give any Miranda warnings prior to his questions of Mendieta. (SH 128)

Lastly, Fox testified that after both passenger and driver were arrested that he (Fox) removed the keys from the mustang, opened

the trunk, observed the contraband here in issue. (See SH 105-106)

The above summarizes the testimony at the motion to suppress as it relates to the issues decided by the trial court and the facts as relating to the "standing" issue are hereby adopted by respondent as stated in the Attorney General's brief.

SUMMARY OF ARGUMENTS

The trial court hearing the live evidence presented at the motion to suppress, observing the witnesses demeanor on the stand, assessing their credibility and taking the case under submission and after having read the points and authorities submitted by both sides came to the conclusion that the evidence seized pursuant to the arrest of the two defendants, and all statements made by those defendants subsequent to the stop of their vehicle, should be suppressed, finding as a matter of fact that the stop, search and arrest made by the Border Patrol officers, were made as a result of a roving patrol, but the stop was made without probable cause and was conducted in an unreasonable manner by the Border Patrol officers.

The court further found that each defendant had standing to raise the issue of the legality of the stop (had a reasonable expectation of privacy in the contents of the vehicle), were lawfully and legally in possession of the automobile, and had exclusive use and possession of the automobile by virtue of the previous permission granted to the driver and passenger to be in and occupying the vehicle on the date of the arrest.

Although the trial court used the words "probable cause", the court also used the words "no basis" which could be viewed as no "reasonable suspicion". The terminology reasonable suspicion being in the view of some, a lesser standard than that of probable cause, nevertheless, the word "basis" as used by the trial court

could be interpreted to be synonymous with the words reasonable suspicion and therefor the court's application of either test to the facts before it was proper.

As to the legal nicety of whether or not the stop/search/seizure arrest of defendants was a "substantial" violation of their constitutional rights, it should be obvious from the facts elicited at the motion to suppress and the conduct of the officers in deciding to and making the stop in the manner in which they did approaching at the enormously high rates of speed within a few feet of the vehicle and then asserting that because the occupants then moved over to the right hand side of the road in somewhat erratic manner that this supplied some additional factor of probable cause is ludicrous. To accept that interpretation would allow the officers to "manufacture their own probable cause" by their own outrageous conduct and then benefit from that conduct by asserting that the response to that outrageous conduct gave rise to suspicion of illegal activity.

The Border Patrol officers on duty at the so-called checkpoint between the borders of Arizona and Utah, many hundreds of miles from both the Canadian and Mexican border had no legal authority to enforce Utah's laws, and certainly under the Federal Rules allowing at most some enforcement authority within a 100 air miles of the borders of the Continental United States would not empower the officers from the Border Patrol to take any action with regards to "roving patrols" in a search for illegal aliens in a location where this stop was made.

In addition, Rule 12(g) is unconstitutional as setting a lower standard than that required by the United States Supreme Court and the Fourth Amendment to the United States Constitution. As will be

discussed later in this brief, states can set a higher standard if they wish, for Fourth Amendment protections, but cannot, in any event set a lower standard than that set by the federal government and the United States Supreme Court. It is respondent's opinion that the court will not have to reach that issue and resolve the constitutionality of Rule 12(g), that this case can be decided on other bases rendering a decision on the constitutionality Rule 12(g) unnecessary.

Finally, it is clear from the facts in this case that both respondents, Mendieta and Mendoza, were detained at the time of the stop by the Border Patrol, that they were not free to leave, and that therefore the interrogation by the officers of both the driver and passenger of the car which resulted in the admissions that they were illegal aliens, and therefore justified their arrest and theoretically the later seizure, were in violation of the requirements of Miranda v. Arizona and therefore the statements being inadmissible the later arrests of respondents and the subsequent search of the vehicle should be suppressed as the result of and the fruit of the earlier illegally obtained statements.

ARGUMENT

POINT I

THE STANDARD APPLIED BY THE TRIAL JUDGE REGARDING THE STOP OF THE VEHICLE WAS THE CORRECT STANDARD, AND, THERE WAS A SUBSTANTIAL VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS WHETHER OR NOT COMMITTED IN GOOD FAITH/BAD FAITH.

The holding by the trial court that the stop of the defendant's vehicle was unlawful was based on a correct standard when it ruled that "there was no basis" or probable cause for said officers to make the initial stop. . . . (Contrary to the attorney general's argument on page 19 of his brief indicating that there were no

articulable facts as a basis. . . for the officers to make the initial stop.

From the testimony elicited at the motion to suppress it appears undisputed that there was no probable cause to arrest the occupants of the vehicle nor was there any probable cause to stop the vehicle.

The "reasonable suspicion test appears to be the proper test to apply to the stop of the vehicle under these circumstances, if in fact this court determines that the officers had any valid authority to do so in the area in which they were working on the evening in question.

The reasonable suspicion test evolves from the case of Almeida-Sanchez v. United States of America (1973), 413 US 266, 37 L.Ed.2nd 596, 93 Supreme Court 2535. In that case the United States Supreme Court ruled that a roving patrol some 20 miles north of the Mexican border in which a vehicle was stopped and searched by Border Patrol officers was not justified on grounds urged by the government.

The government in Almeida-Sanchez, supra, argued that the Immigration Nationality Act (INA) Section 287(a)(3) (Attached as appendix One) which provides for warrantless searches of autos within a reasonable distance from any external boundary of the United States as authorized by the Attorney General of the United States.

The Attorney General's regulation defines a reasonable distance as within 100 air miles of the border. See 8 CFR-287.1. (Appendix 1)

In Almeida-Sanchez, supra, the court discussed three types of surveillance conducted by the Border Patrol regarding illegal aliens:

1. Permanent check points (Nodal Intersections)
2. Temporary check points (Various locations-Conducted from time to time.
3. Roving Patrols.

In construing the Attorney General's regulation authorizing searches and stops of vehicles within 100 miles of the border the court in Almeida-Sanchez, supra, stated:

> "No act of Congress can authorize a violation of the Constitution."

The court held that the stop/search in this case was:

1. Not a border search. 2. Not the functional equivalent of the border, 3. Not a check point stop, but was a roving patrol stop by the Border Patrol officers and therefore probable cause to believe persons in the car were aliens was necessary to stop the vehicle.

An interesting argument made by the government in Almeida-Sanchez at footnote 5 of that opinion was that a stop search on a highway which is a common route for illegal aliens to travel was valid and that roving patrols had apprehended 195 aliens on that road in one year alone. The court's response to that argument was that possibly all the others were stopped on valid probable cause and that there was no way to tell how many innocent drivers were stopped without probable cause and subjected to searches of their vehicles. The court then looked to the words of Justice Jackson when he returned from the Nuremburg trials, (See 93 Supreme Court 2540):

> "These(Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

See also Brinegar v. United States, 338 US 160.

Two years later in 1975 the United States Supreme Court ruled in United States v. Brignoni Ponce, 422 US 873, 45 L.Ed.2d 607,

95 Supreme Court 2574, that a roving patrol could stop autos only if officers were aware of specific articulable facts that reasonably warranted suspicion that autos contained illegal aliens and that the Mexican ancestry of the occupants is not sufficient standing alone to justify a stop.

Brignoni Ponce differed from Almeida-Sanchez in that the Border Patrol did not claim authority to search cars but did claim the authority to stop and question occupants regarding their citizenship and immigration status. In Brignoni Ponce the Border Patrol officers were working at a fixed check point located at Highway 5, south of San Clemente, California, however at the time they observed the vehicle in question the check point had been closed because of inclement weather.

The two Border Patrol officers were nevertheless watching the northbound traffic from a car on the highway, it was dark and they were using their headlights to see into the passing cars. They saw a car pass containing three mexicans, stopped it and questioned the occupants regarding their status. The questioning of the occupants led the officers to believe that they were illegal aliens, they were all three arrested and one of them was charged with a violation of federal law regarding transportation of illegal aliens. The trial court denied a motion to suppress the testimony regarding the questions and answers of the occupants at the time of the stop. The Ninth Circuit Court of Appeals held this to be a roving patrol rather than a fixed check point stop and that the Fourth Amendment forbids such a stop for questioning unless on founded suspicion that the car contained aliens and that mexican ancestry alone was not a founded suspicion.

At oral argument the government conceded that the stop was a

roving patrol however, they argued that 10 to 12 million aliens were in the United States at that time, that 85 percent of those were from Mexico and that it was the Broder Patrol's goal to prevent inward movement in the United States and that stopping automobiles and questioning the occupants as to their status was a "modest intrusion" and that all that was required was an answer to certain questions of the Border Patrol and production of documents showing a right to be in the United States.

The Supreme Court rejected the government's argument and affirmed the Ninth Circuit Court of Appeal and in doing so reviewed the requirements of Terry v. Ohio, 392 US 1, 20 L.Ed.2nd 889, 88 Supreme Court 1868, regarding the requirements of a pat down search for weapons and that the officer in conducting a "Terry" stop must reasonably believe that the suspect stopped is armed and dangerous and that a pat down search is necessary for his safety, and that this believe must be based on specific articulable facts and rational inferences based thereon to warrant such a belief.

The "brief stop" in Terry, suprs, was held to constitute a "seizure" under the Fourth Amendment.

The Supreme Court held in Brignoni Ponce, supra, that when the officer's observations lead him to reasonably suspect that the auto may contain illegal aliens he may stop the car briefly and investigate the circumstances which provoked the suspicion. He may ask the driver and passenger regarding their immigration status but any further detention or search must be based on probable cause or consent.

Some of the factors considered in determining whether the officers might have probable cause in such a stop are as follows:

1. The distance from the border to the stop was made,
2. Information in possession of the officers regarding

earlier border crossings of this particular car,

3. The normal pattern of traffic in the area,
4. The driver's suspicious behavior,
5. The officer's observations that the vehicle appears to be heavily loaded,
6. The number of passengers in the car,
7. Erratic driving,
8. An attempt to evade the officers when being stopped,
9. Characteristic appearance of aliens, i.e. mode of dress, haircut, etc.

The court in Brignoni Ponce, supra, also examined the Attorney General's regulation (8 CFR 287.1(a)) regarding 100 air miles from the border being reasonable and held it was not reasonable to make such stops on a random basis. (See Appendix 1)

The court also commented that large numbers of native born and naturalized citizens, even those living in border areas have the same physical characteristics as illegal Mexican aliens, and again concluded that Mexican ancestry may be a factor to be considered but it was not enough standing alone to justify a stop to inquire.

Another case which came down in 1975 from the United States Supreme Court in which the court examined the relationship between a temporary check point and a roving stop was United States of America v. Ortiz, 422 US 891, 95 Supreme Court 2585.

In Ortiz, supra, the Border Patrol was maintaining a check point at San Clemente about 62 air miles north of the Mexican border, and stopped the car for a routine immigration search at the traffic check point. Three aliens concealed in the trunk of the car were found and the driver was convicted of transporting aliens. The Ninth Circuit reversed on the bais of Almeida-Sanchez, and on review

the Supreme Court stated that the only question for decision was whether or not vehicle searches at traffic check points like the roving patrol in Almeida-Sanchez must be based on probable cause. See Ortiz, supra, page 2586.

In holding that the roving patrol and the check point stop were identical in sofaras the search of the vehicle was concerned, the court held that the regularity, notice to motorists, etc., which attended the check point stop did not mitigate the invasion of privacy that a search would entail, that motorists whose cars are searched unlike those that are only questioned are not reassured by seeing that the Border Patrol searches other cars as well.

In addition the court held they were not pursuaded that the check point limits the officer's discretion to select cars for search in any meaningful way.

The court stated at page 2588 in Ortiz"

> "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. (Emphasis ours) To protect that privacy from official arbitrariness, the court has always regarded probable cause as the minimum requirement for a lawful search."

The analysis of the above cases and the current state of the law is that a "roving patrol" even on a highway leading directly from the border and only 20 to 30 miles from Mexico requires probable cause in order for the officers to legally stop the vehicle (Absent a fixed check point regarded as the "functional equivalent" of the border). Further probable cause or consent would be necessary in order to search the vehicle, and this is so even if the occupants of the vehicle i.e., the driver and passenger were arrested validly for being illegal aliens.

Absent some showing that the vehicle itself was heavily loaded or other probable cause to believe that it came directly from the border or contained illegal aliens within it would not justify a search of the trunk of such a vehicle.

Other cases have similarly held such stops/searches by roving patrols to be invalid even when the proximity of the border is as close as three miles. In United States v. Perez, 644 F2d 1299 (1981), the Ninth Circuit ruled that customs agents searching a vehicle located three miles north of the Mexican border was invalid because there was no nexus of the vehicle to the crossing of the border.

The Ninth Circuit also held that a search of the vehicle known to have crossed the border was illegal where the surveillance of the vehicle after the crossing of the border was not continuous. See United States v. Portillo, 469 F2d 907 (1972).

Recently the Supreme Court of the State of Utah in the case of State v. Swanigan, 699 P.2d 718 (1985), reversed a conviction of burglary on the grounds that the stop and search of the defendant which produced evidence previously stolen from a burglary was illegally seized. In Swanigan householders had phoned the police when they returned home and found out that their home had been burglarized. An officer went to investigate and while enroute to the home noticed two individuals walking alongside a road. Both individuals allegedly "stared" at the officer as he drove by. Later on the officer requested that other officers attempt to locate the two individuals he had seen earlier. Approximately two hours later another officer spotted the two individuals (fitting the description given by the previous officer) about three blocks from the victim's home. This officer ordered the two individuals to stop, asked for identification, made a warrant check and found out that one of the persons had an outstanding traffic warrant. Both were arrested and in the subsequent

pat down search of the pair some of the jewelry and property taken from the victim's home was discovered.

At trial the defendant challenged his detention under Terry v. Ohio, supra, the trial court denied the motion holding that under Adams v. Williams, 407 US 143 (1972), that the detention was based upon a "reasonable suspicion" on the part of the officers. In reversing, the Utah Supreme Court held, quoting from Brown v. Texas, 443 US 47, 51 (1979), that:

> "A brief investigatory stop of an individual by police officers is permissible when the officers have a reasonable suspicion based on objective facts that the individual is involved in criminal activity."

The court held that the officer who stopped the defendant and his companion lacked a reasonable suspicion to believe that they had engaged in criminal conduct. The court stated:

> "The stop was based solely on a description by a fellow officer who had observed the two earlier in an area where many burglaries had been reported, Neither officer had observed either of the men engaged in an unlawful or suspicious activity, therefore the stop was based on a mere hunch rather than the constitutionally mandated reasonable suspicion."

Apropos in the Swanigan case is that no signifigance was given to the fact that the two individuals stopped had earlier "stared" at the first officer.

The "automobile search" exception to the warrant requirement was first set out in the case of Carroll v. United States, 267 US 132 (1925). This case involved a violation of the Volstead Act, the officer however having ample probable cause to stop the vehicle, the defendants previously agreeing to sell liquor to the same federal agents in another state.

Brinegar v. United States, supra, parallels the Carroll case in that when the officers stopped the car the defendant was known

to them by reputation, had been arrested five months previously for illegal transportation of aliens and had been observed loading liquor into his car in Missouri, the car also appeared to be heavily loaded and it increased its speed in an attempt to evade the officers.

In United States v. Ross, 456 US 798 (1982), the Supreme Court upheld the search of a bag in a pouch located in the trunk of defendant's vehicle because the police had received information from and informant that defendant was selling narcotics out of the trunk of his car, his physical description and a description of the automobile and also his alias and a description of the neighborhood where he could be found were given to the police. The defendant was also observed in the area by means of his license number which resulted in the confirmation of his alias.

In upholding the search in Ross the Supreme Court again viewed the exception to the warrant requirement established in Carroll, supra, and reaffirmed that such exception applies only to searches of vehicles that are supported by probable cause and that in this class of cases a search is not unreasonable if based on facts which would justify the issuance of a warrant even though a warrant had not actually been obtained.

In United States v. Rubakava-Montoya, 597 F2d 140 (1978), defendant was convicted of transporting illegal aliens having been arrested two weeks earlier at the same check point on similar charges. On this occasion he got out of his car and walked toward the agent with a "dejected" or "hangdog" look on his face. The court held that a prior arrest and an unusual demeanor are insufficient facts upon which to base probable cause to search.

In United States v. Loper, 564 F2d 710 (5th Cir. 1977), defendant was convicted of possession of marijuana with intent to distribute. He was stopped in his vehicle at a check point at the

intersection of two roads, both of which were approximately 55 miles from the Mexican border.

The defendant did not make eye contact with the agents, his car was riding high in the back and it was registered in a county located 300 miles away.

The Fifth Circuit held that this evidence was insufficient to establish probable cause. The failure to make eye contact with law enforcement officers is a commonplace occurrance. The truck riding high is the opposite of what would be expected of a car transporting aliens, and persons whose license plates are from out of the county or state should be allowed to travel freely without having their purposes questioned.

Loper, supra, parellels the testimony of the Border Patrol officers in this case, i.e. that when approaching defendant's vehicle neither the driver or the passenger looked back at the officers which to the officers was a "suspicious" action on their part, and in addition the vehicle they drove carried California license plates, a "border state" which further heightened their suspicions.

In conclusion, all the cases cited above regarding roving patrol stops by Border Patrol officers indicate that probable cause is necessary to affect the stop. Even if this court determines that a "reasonable suspicion" standard is appropriate then the facts of this case bear out clearly that the officers had no reasonable suspicion to stop this vehicle. The testimony of the officers is clear in that they wanted to stop the car to "take a second look", that they "wondered" if there was anyone else in the car other than the driver and the passenger, and that the officers outrageous conduct in speeding up to speeds of 80 to 85 miles an hour behind defendant's vehicle causing them to pull over to the right side of the road and

then characterizing that conduct as "erratic" driving is no more than a facile attempt to manufacture their own probable cause or suspicions and give credence to a "hunch" that they had that the occupants of the vehicle might be illegal aliens. There is no question that the application of the lowest standard available, that of "reasonable suspicion" was applied by the trial court in this case when it clearly said it found "no basis" for the stop of the vehicle. It would appear then, that there is no magic in the words reasonable suspicion when a trial judge finds no basis for the stop in question.

The Attorney General's reliance on State v. Gibson, 665 P.2d 1302, is misplaced. In Gibson, the defendant was convicted of driving with a revoked driver's license, on the basis of a state trooper's stopping him in his automobile, the court holding that the trooper had a"reasonable suspicion" that the defendant's driver's license was and had been and still was revoked. In Gibson, the trooper in question was present when defendant was tried and convicted for driving under the influence. On June 1, 1981, the trooper checked the defendant's driver's license and found that in fact it had been revoked (presumably for a year under Utah law).

On September 21, 1981, the trooper observed the defendant driving his vehicle and knowing that the driver's license of the defendant had been revoked, stopped the defendant to ascertain if the license was still revoked. The stop of the defendant was held valid by the court in that the officer had unique personal information that the defendant in all probability was driver on a revoked license.

There is no question of reasonable suspicion in the Gibson case and neither the facts in Gibson nor the application of the reasonable suspicion test assists in the determination of the case

at bench.

In a recent case the Supreme Court of Utah filed February 4, 1986, State v. Carpena, 27 Utah ADV. REP. 29, the court upheld in a per curiam opinion the suppression of evidence by the District Court of narcotics seized by officers.

In Carpena, supra, a police officer on patrol at 3:00 A.M., in a neighborhood which had a high incident of burglaries observed a slowly moving automobile with Arizona license plates. The officer did not observe any criminal or traffic offenses and had no information of a report of a burglary on that particular night. The officer followed the car for three blocks, then turned on his red lights, at which time the car pulled into a driveway belonging to one of the occupants of the car.

After detaining the occupants the officer found an unloaded pistol in the vehicle, took the keys from the ignition, opened the trunk without consent and found 30 pounds of marijuana in a garment bag.

The Supreme Court in upholding the District Court's suppression order and citing Swanigan, supra, found that the police officer had no reasonable suspicion to make the investigatory stop, that the stop was based merely on the fact that a car with out-of-state plates was moving slowly through a residential neighborhood late at night, that the officer had no objective facts upon which to base a reasonable suspicion that the men were involved in criminal activity.

Carpena is significant in that it would appear that the officer in that case had more objective facts upon which to base the stop than the Border Patrol officers in the case at bench.

POINT II

THE DEFENDANTS DID HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE VEHICLE IN WHICH THEY WERE RIDING AND LEGALLY POSSESSED, ALLOWING THEM TO CHALLENGE THE

STOP/SEARCH OF THE VEHICLE.

The Attorney General does not argue the different positions of the driver versus the passenger as to the "standing" issue and therefore this argument will be addressed only to the question of whether the driver (Mendoza) had a reasonable expectation of privacy in the vehicle which he had borrowed from his friend Gomez to complain initially of the stop of the vehicle, the manner in which in was carried out, the arrest and subsequent search of the vehicle.

The State relies on the case of State v. Valdez, 689 P.2d 1334 (Utah 1984).

A close reading of Valdez, supra, indicates that the defendant in that case was validly stopped when in the early morning hours police officers noticed that he and a female companion were driving a car which had no front license place (a violation of law), and stopped the vehicle to check the driver and his registration. The defendant produced a driver's license with his photograph but with a false name imprinted upon it and he was validly arrested for that offense.

Upon questioning defendant denied ownership of the car, the officers searched the vehicle discovering a briefcase in the trunk which contained forged checking materials.

The Supreme Court in declining to reach the search and seizure issues involved in the case decided that based on the defendant's statements denying ownership in the car or the briefcase he had failed to show any "legitimate expectation in the effects searched" and therefore had no standing to complain of that search.

In the case at bench, long before the issue of the search of the trunk of the vehicle was raised, the defendants challenged the

propriety of the initial stop and it was discussed earlier in this brief.

There is no question that based on the facts of the stop as testified to in the District Court that the judge made a correct ruling on that issue.

With regard to defendant's reasonable expectation of privacy in the vehicle in which they were riding and the contents of that vehicle it appears clear from the testimony that Mendoza had received valid permission from the registered owner of the vehicle, Gomez, to not only drive the vehicle to Las Vegas but to allow defendant Mendieta to ride as a passenger on the way to Colorado, Mendieta offering to pay $100 for expenses, i.e. gasoline for the trip north.

Certainly, the two defendants had every right and reason to believe that the vehicle in which they were riding and their own personal effects in that vehicle were lawfully in their possession and therefore had a reasonable expectation of privacy therein.

Adopting the Attorney General's argument that an ownership interest in the vehicle is necessary and essential to advance the theory of a legitimate expectation of privacy, would apparently leave all persons who travel by bus, airplane, train, etc., in the position of having no "standing" to complain of a search of those vessels in that they did not own them but merely riding in them with the permission of the carrier. Such a contention is ludicrous and without any basis in common sense.

The Attorney General argues that the trial court based its finding of standing solely on defendant's possession of and presence in the vehicle they were driving, but that does not fairly state the evidence received by the District Court judge.

Testimony was taken at the hearing of the motion to suppress

from defendant Mendoza that he had borrowed the car from Gomez, that he had talked to Gomez later from Las Vegas, had obtained Gomez' permission to allow Mendieta to ride along in the car, that Mendieta was going to pay expenses for the trip north with a further promise that he (Mendoza) would return the car to Los Angeles by the following Sunday.

That evidence was admitted over objection of the county attorney who objected on hearsay grounds, however, the classic definition of hearsay does not apply to words of direction, consent, permission and identification. See Federal Rules of Evidence, Rule 801.

Federal Rules of Evidence, Rule 803 defines certain exceptions to the hearsay rule, i.e. Rule 803(1) A present sense impression describing or explaining an event or condition made while declarant was perceiving the event or immediately thereafter. Rule 803(3) the statement of the declarant's then existing state of mind, emotion i.e.....intent, motive etc.

See also Wharton Evidence 13th Edition, Volume 2.

POINT III

THE STATEMENTS ELICITED FROM BOTH THE DRIVER AND PASSENGER BY THE BORDER PATROL OFFICERS AT THE TIME THE VEHICLE WAS STOPPED WERE OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA INASMUCH AS DEFENDANTS WERE BEING "DETAINED" AND NOT FREE TO TO LEAVE THE SCENE AT THE TIME THE STATEMENTS WERE MADE, SUCH STATEMENTS BEING THE PREDICATE FOR THE LATER ARREST OF DEFENDANTS AND THE SEARCH OF THE VEHICLE.

It is clear from the testimony of both Border Parol officers that both defendants were interrogated, told to produce papers, questioned as to their legal status after the initial stop and prior to any search and only upon the answers being given by the defendants were they arrested for violation of federal law, i.e. illegal aliens in the United States, and it was conceded by both officers that

there was no advisement of their right to remain silent prior to the interrogation.

The Attorney General does not address the issues as to the statements of the respondents/defendants being in violation of Miranda v. Arizona, however the District Court judge in his order of suppression specifically ordered all statements made by both defendants subsequent to the stop of the vehicle suppressed, therefore, the statements of the defendants being the primary if not exclusive reason for their arrest and the search of the vehicle following that arrest being based the officer's thought "might" be another illegal alien in the trunk, it seems clear that if the stop was illegal, then the warrantless search of the trunk is also illegal.

POINT IV AND V

THE TRIAL JUDGE'S FAILURE TO SPECIFY THAT THE OFFICERS ACTED IN BAD FAITH IS NOT FATAL, ALTERNATIVELY, THE FINDINGS BY THE TRIAL COURT ON THIS ISSUE ARE NOT REQUIRED AT ALL IF THIS COURT FIND THAT RULE 12(g) IS UNCONSTITUTIONAL AND IN VIOLATION OF THE UNITED STATES CONSTITUTION FOURTH AMENDMENT, IN THAT IT SETS A LOWER STANDARD THAN THE MINIMUM SET BY THE UNITED STATES SUPREME COURT.

The Attorney General argues that the trial court in failing to make specific findings regarding Rule 12(g)(1) at the suppression hearing and its later refusal to do so upon the motion to reconsider amounts to the trial court's ignoring the specific requirements of the rule and therefore is fatal to the finding that the trial court made when it suppressed the evidence.

This view of the trial court's ruling and the evidence elicited at the motion to suppress ignores the conduct of the Border Patrol officers in the manner in which they stopped the vehicle and their alleged reasons for doing so.

To require such technical "niceties" from a trial court judge

when the evidence is abundantly clear that the conduct of the officers involved was egregious and both the reasons they had for stopping the vehicle and the manner in which it was stopped is ludicrous.

The Attorney General argues at some length about the effect of United States v. Leon, 104 Supreme Court 3405 (1984), in which that court fashioned an objective "good faith" exception to the exclusionary rule, recognizing that that case specifically involved a case in Burbank, California, in which a search warrant was relied upon by the officers making the arrests and seizures.

In discussing Leon, supra, and indicating that the Utah Supreme Court has never ruled upon the constitutionality of its "good faith" exception, refusing to do so in the State v. Anderson, 701 P.2d 1099, the Attorney General seems to be inviting this court to so rule in this case.

However, the Attorney General is reduced to citing to this court the case of United States v. Williams, 622 F2d 830 (5th Circuit 1980), a case that predated Leon by four years, and then by some unknown extension of logic argues that the "good faith" exception to warrantless searches should be applied *ab* initio vis a vis Williams, supra, which to say the least is puzzling.

In the Williams case, supra, the defendant was arrested by a federal narcotics agent for violating a court imposed travel restriction imposed as a condition of bail while the defendant was awaiting trial.

The officer had personal knowledge that the condition of travel had been imposed, and therefore when he stopped her acted in good faith on the belief that her bail conditions remained in force and that therefore she was in violation of a statute.

The subsequent incidental search of the defendant produced the heroin which was the subject of the later prosecution.

This case turned simply on whether or not the officer in making the arrest for an alleged "contempt of court" in that the defendant had violated her conditions of release on a federal case was made in "good faith" or whether it was made in a bad faith intent to harass the defendant or for other reasons.

The court discussed certain forms of "technical violations" made in good faith when the officers relied on a statute that is later declared unconstitutional or as in the Williams case on a reasonable interpretation of the statute that is later construed differently (the Contempt Statute), the court observing, that the exception applies only if the police belief is both bonafide and reasonable. Suppression will still result if the officers allege a good faith belief in a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws", or in a law that violated a "controlling precedent that it was. . . unconstitutional." Quoting from Michigan v. Defillipo, 443 US at 38, 99 Supreme Court at 2632.

In any event, Rule 12(g)(2) states that a search or seizure shall in all cases be deemed substantial if one or more of the following is established by the defendant or applicant by a preponderance of the evidence:

> (i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency;
> (ii) The violation was intended only to harass without legitimate law enforcement purposes.

Rule 12(g)(3) states as follows:

> In determining whether a peace officer was acting in good faith under this section the court shall consider in addition to any other relevant factors

some or all of the following;

(i) The extent of deviation from legal search and seizures standards;

(ii) The extent to which exclusion will tend to deter future violations of search and seizure standards;

(iii) Whether or not the officer was proceeding by way of a search warrant, arrest warrant, or relying on previous specific directions of a magistrate or prosecutor; or

(iv) The extent to which privacy was invaded.

(v) If the defendant or applicant establishes that the search and seizure was unlawful and substantial by a preponderance of the evidence, the peace officer or governmental agency must then, by a preponderance of the evidence, prove the good faith actions of the peace officer.

It would appear from the evidence elicited at the motion to suppress that the defense proved to the satisfaction of the trial judge that the violation by the Border Patrol officers was at once negligent, willful, shocking to the conscience and was a practice of law enforcement agency (Border Patrol) pursuant to the general order of that agency, that the officers did not act in good faith in that the deviation from legal search and seizures standards was substantial and it was obvious from the exclusion order that at least the Border Patrol will be on notice to deter future violations of the law in these areas, that the officer was not acting pursuant to a warrant of any kind, and that the extent of privacy that was invaded was substantial.

On the other hand, the county prosecutor put on no evidence to show that the Border Patrol officers acted in good faith, just the contrary was shown by the evidence.

The Attorney General cites another case to this court INS v. Lopez-Mendoza, 104 Supreme Court 3479 (1984), as a basis for the Attorney General's theory that the good faith extension of Leon should be applicable to warrantless searches.

INS v. Lopez-Mendoza, supra, had to do with a deportation proceeding, a civil action to determine eligibility to remain in the

United States, and the issue was whether or not the issue of an illegal arrest of the alien could be raised to block the proceeding which was seeking to deport him.

The Supreme Court held that the exclusionary rule does not apply in a deportation hearing, that hearing being civil in nature, any reference to "good faith" in that case was purely dicta and had nothing to do with the issues nor the holding.

It is respondent's position that the trial court was not required to make specific findings on the record to avoid the sanctions of Rule 12(g), rather those findings are clear by implication in the trial court's suppression order and also from the evidence it heard prior to making that order.

This court's position in the State v. Anderson, 701 P.2d 1099, 1103 Utah (1985), (supra), indicates clearly that this court will not address the constitutionality of an issue i.e. statute rule, etc., if the case can be decided on other grounds.

It is respondent's suggestion that this court does not have to inquire into the validity i.e. constitutionality of Rule 12(g), in that the case can be decided very simply on the basis of the arguments made regarding the stop, etc..

If however, the court decides to rule on the validity of Rule 12(g) then this court must realize that the standards set in Rule 12(g) are much lower than those set out by the United States Supreme Court.

Under the Fourth Amendment to the United States Constitution made applicable on the states by the Fourteenth Amendment, no state can set standards for compliance with Fourth Amendment protections that are lower than those set by the United States Supreme Court. See United States v. Robinson, 414 US 218, and Gustafson v. Florida, 414 US 260 (1973), and also the discussion in People v. Brisendine, 13 Cal3d 528, 545, in which the California Supreme Court discussed the

applicability of Gustafson and Robinson, supra, as being binding on the California Supreme Court (This was a pre 1982 case prior to California's Proposition 8 Initiative) and viewed the federal cases as being the minimum standards required in order to satisfy the Fourth Amendment proscription of unreasonable searches.

United States Supreme Court in Cooper v. California. (1967) 386 US 58, 52, recognized the well-known principle that a state can impose higher standards on Fourth Amendment issues than that required by the Federal Constitution if it chooses to do so, but not lower standards.

It seems abundantly clear in the case at bench that the conduct complained of by the Border Patrol officers was an illegal stop, search, interrogation under federal law, but to require a lower standard by reason of the mandates of Rule 12(g) by a finding of "bad faith" on the part of the arresting officers clearly imposes a lower standard than that required by the United States Supreme Court and its decisions.

This writer is aware of no case which has extended the "good faith" principle of Leon, supra, applicable to warrant searches being extended to warrantless searches.

The Attorney General invites this court to do so in its construing of Rule 12(g), however, respondent as stated above urges both that the court not engage in that analysis because it does not have to and secondly, if the court feels it must, that it must gauge that analysis by Fourth Amendment standards as set by the United States Constitution and the applicable Supreme Court decisions in that area.

POINT VI

THE BORDER PATROL AGENTS HAD NO LEGAL AUTHORITY TO STOP THE MUSTANG WITH OR WITHOUT A REASONABLE SUSPICION OR PROBABLE CAUSE; THEY WERE NEITHER PEACE OFFICERS OF THE STATE OF UTAH AS DEFINED

IN THAT STATE'S CODE NOR WERE THEY AUTHORIZED BY FEDERAL LAW TO STOP VEHICLES MORE THAN 100 MILES FROM ANY CONTINENTAL UNITED STATES BORDER.

The Utah Laws of Criminal Procedure, Section 77-2-1, specifies what constitute a Category III peace officer and in Sub-Section (d), specifies federal officers recognized as peace officers in the State of Utah.

Although Utah recognizes special agents of the United States Customs among others there is no recognition of officers of the Immigration and Naturalization Service (INS) of which the Border Patrol officers are employees.

Therefore, quite simply, the Border Patrol officers were not in the State of Utah pursuant to any request by any sheriff or others in authority in the State of Utah, not having any authority to make arrests under Utah law for any violation of law and not being authorized to perform border patrol functions more than 100 miles from the border pursuant to rules set out by the Immigration and Naturalization Service (See 8 CFR Chapter One, Section 287) (Appendix 1 attached).

It it clear from the Code of Federal Regulations and also Title 8, Section 1357 of the Immigration Act (See Appendix 2) that the Border Patrol officers were many hundreds of miles from either the Canadian or Mexican border when they elected to stop respondents on Interstate 15 on the night in question.

Clearly there was no showing by the prosecution that anyone in Utah with authority requested them to be there, that there is no evidence that the district director (of the INS) that, in his opinion, there was a necessity for having Border Patrol agents more than 100 miles from the external boundary of the border and that therefore, in the absence of such direction by the director of INS (which would

be questionable to say the least) the Border Patrol officers were acting without the authority of any Utah mandate and without the authority of the United States Government when they stopped the defendants/respondents.

CONCLUSION

For all of the above reasons this court should affirm the trial court's order suppressing the evidence.

Respectfully submitted this 20th day of March, 1986.

JOHN E. MEYERS
Attorney for Defendant/Respondent
ALBERTO RUIZ MENDIETA

MAILING CERTIFICATE

I hereby certify that I mailed four true and exact copies of the foregoing brief, postage prepaid to David D. Thompson, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, and to Peter L. Rognlie, Deputy Washing County Attorney, P. O. Box 579, St. George, Utah 84770, and to MacArthur Wright, P. O. Box 339, St. George, Utah 84770 this 21st day of March, 1986.

APPENDIX 1

Board w .in 15 days after the mailing of the notification of decision as provided in Part 3 of this chapter

(Secs. 103, 239, 254, 255, 256, 271, 273 and 280, 8 U S C 1103, 1229, 1284, 1285, 1286, 1321, 1323 and 1330)

[22 FR 9808, Dec 6, 1957, as amended at 23 FR 9124, Nov 26, 1958, 46 FR 28624, May 28, 1981]

PART 282—FORMS FOR SALE TO PUBLIC

§ 282.1 Forms printed by the Public Printer.

The Public Printer is authorized to print for sale to the public, the forms listed in § 299.3 of this chapter.

(Sec. 103, 66 Stat. 173, 8 U S.C 1103)

[45 FR 6777, Jan. 30, 1980]

PART 287—FIELD OFFICERS; POWERS AND DUTIES

Sec
287.1 Definitions
287 2 Criminal violations, investigation and action
287 3 Disposition of cases of aliens arrested without warrant.
287 4 Subpoena.
287 5 Power and authority to administer oaths
287 6 Proof of official records.

AUTHORITY Secs 103, 235, 236 242, 287 66 Stat. 173, 198, 200, 208, as amended, 233, 8 U S C. 1103, 1225, 1226, 1252, 1357

§ 287.1 Definitions.

(a)(1) ***External boundary.*** The term "external boundary," as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) ***Reasonable distance.*** The term "reasonable distance," as used in section 287(a) (3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable

(c) *Exercise of power by immigration officers.* Any immigration officer is hereby authorized to exercise anywhere in the United States all the powers conferred by section 287 of the Act.

(d) *Disposition of felony cases.* The cases of persons arrested for felonies under paragraph (4) of section 287(a) of the Immigration and Nationality Act shall be handled administratively in accordance with the applicable provisions of § 287.2 but in no case shall there be prejudiced the right of the person arrested to be taken without unnecessary delay before another near-by officer empowered to commit persons charged with offenses against the laws of the United States.

(e) ***Power to arrest persons who bring in, transport, or harbor certain aliens, or induce them to enter.*** Any immigration officer shall have authority to make arrests for violations of any provision of section 274 of the Immigration and Nationality Act.

(f) ***Patrolling the border.*** The phrase "patrolling the border to prevent the illegal entry of aliens into the United States" as used in section 287 of the Immigration and Nationality Act means conducting such activities as are customary, or reasonable and nec-

"APPENDIX 1"

sary, to prevent the illegal entry of aliens into the United States.

[22 FR 9808, Dec. 6, 1957, as amended at 29 FR 13244, Sept. 24, 1964]

§ 287.2 Criminal violations; investigation and action.

Whenever a district director or chief patrol agent has reason to believe that there has been a violation punishable under any criminal provision of the laws administered or enforced by the Service, he shall cause an investigation to be made immediately of all the pertinent facts and circumstances and shall take or cause to be taken such further action as the results of such investigation warrant.

[35 FR 16362, Oct. 20, 1970]

§ 287.3 Disposition of cases of aliens arrested without warrant.

An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer, unless no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, in which event the arresting officer, if the conduct of such examination is a part of the duties assigned to him, may examine the alien. If such examining officer is satisfied that there is prima facie evidence establishing that the arrested alien was entering or attempting to enter the United States in violation of the immigration laws, he shall refer the case to an immigration judge for further inquiry in accordance with Parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or other regulations applicable to the particular case. If the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws, further action in the case shall be taken as provided in Part 242 of this chapter. After the examining officer has determined that formal proceedings under sections 236, 237, or 242 of the Act, will be instituted, an alien arrested without warrant of arrest shall be advised of the reason of his arrest and his right to be represented by counsel of his own choice, at no expense to the Government. He shall also be provided with a list of the available free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where his deportation hearing will be held. It shall be noted on Form I-213 that such a list was provided to the alien. He shall also be advised that any statement he makes may be used against him in a subsequent proceeding and that a decision will be made within 24 hours or less as to whether he will be continued in custody or released on bond or recognizance. Unless voluntary departure has been granted pursuant to § 242.5 of this chapter, the alien's case shall be presented promptly, and in any event within 24 hours, to the district director, acting district director, deputy district director, assistant district director for investigations, officers in charge at Agana, GU; Albany, NY; Charlotte Amalie, VI; Cincinnati, OH; Hammond, IN; Milwaukee, WI; Norfolk, VA; Oklahoma City, OK; Pittsburgh, PA; Providence, RI; Salt Lake City, UT; St. Louis, MO; Spokane, WA for a determination as to whether there is prima facie evidence that the arrested alien is in the United States in violation of law and for issuance of an order to show cause and warrant of arrest prescribed in Part 242 of this chapter

[22 FR 9808, Dec. 6, 1957, as amended at 32 FR 6260, Apr. 21, 1967; 44 FR 4654, Jan. 23, 1979; 44 FR 15996, Mar. 16, 1979]

§ 287.4 Subpoena.

(a) *Who may issue*—(1) *Prior to commencement of proceedings.* Except as provided in § 335.11 of this chapter, subpoena requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued by a district director upon his own volition prior to the commencement of a proceeding.

(2) *Subsequent to commencement of proceedings.* In any proceeding under this chapter, other than under Part 335 of this chapter, and in any pro-

APPENDIX 2

Cross References

Definition of the term—
Alien, see section 1101(a) (3) of this title.
Service, see section 1101(a) (34) of this title.

§ 1357. Powers of immigration officers and employees—Powers without warrant

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

Administration of oaths; taking of evidence

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

Search without warrant

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search.

June 27, 1952, c. 477, Title II, ch. 9, § 287, 66 Stat. 233.

Historical Note

Legislative History. For legislative history and purpose of Act June 27 1952, see 1952 U.S.Code Cong and Adm News, p 1653

Cross References

Definition of the term—
- Alien, see section 1101(a) (3) of this title.
- Attorney General, see section 1101(a) (5) of this title.
- Entry, see section 1101(a) (13) of this title.
- Immigration officer, see section 1101(a) (18) of this title.
- Service, see section 1101(a) (34) of this title.
- United States, see section 1101(a) (38) of this title

Felony classified as an offense punishable by death or imprisonment for a term exceeding one year, see section 1 of Title 18, Crimes and Criminal Procedure.

Library References

Aliens ⇐44
Searches and Seizures ⇐3.3, 7(11).
C J S Aliens §§ 80, 83
C J S Searches and Seizures §§ 18, 65 et seq.

Notes of Decisions

Generally 4
Arrest without warrant
- Generally 12
- Escape, likelihood of 13
- Probable cause 14

Authority of officers 6
Constitutionality 1
Construction 2
Custodial interrogation 10
Due process 8